

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

WAYNE JEROME ROBERTSON,	)	No. C 12-4698 JSW (PR)
	)	
Plaintiff,	)	<b>ORDER OF SERVICE</b>
	)	
v.	)	
	)	
SGT. W. STRUFFERT, et al.,	)	
	)	
Defendants.	)	

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**INTRODUCTION**

Plaintiff, a California prisoner proceeding pro se, filed this civil rights complaint under 42 U.S.C. § 1983 against officials at Pelican Bay State Prison, where Plaintiff was formerly housed. Plaintiff's application to proceed *in forma pauperis* is granted in a separate order. This Court now reviews the complaint pursuant to 28 U.S.C. § 1915A and orders it served upon certain Defendants.

**DISCUSSION**

I. Standard of Review

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint "is frivolous, malicious, or fails to state a claim upon which relief may be granted," or "seeks monetary relief from a

1 defendant who is immune from such relief.” *Id.* § 1915A(b). Pro se pleadings must be  
2 liberally construed. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir.  
3 1990).

4 Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement  
5 of the claim showing that the pleader is entitled to relief." "Specific facts are not  
6 necessary; the statement need only "give the defendant fair notice of what the . . . claim  
7 is and the grounds upon which it rests." *Erickson v. Pardus*, 127 S. Ct. 2197, 2200  
8 (2007) (citations omitted). Although in order to state a claim a complaint “does not need  
9 detailed factual allegations, . . . a plaintiff’s obligation to provide the ‘grounds of his  
10 ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic  
11 recitation of the elements of a cause of action will not do. . . . Factual allegations must  
12 be enough to raise a right to relief above the speculative level.” *Bell Atlantic Corp. v.*  
13 *Twombly*, 127 S. Ct. 1955, 1964-65 (2007) (citations omitted). A complaint must proffer  
14 "enough facts to state a claim for relief that is plausible on its face." *Id.* at 1974. Pro se  
15 pleadings must be liberally construed. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696,  
16 699 (9th Cir. 1990).

17 "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need  
18 detailed factual allegations, . . . a plaintiff’s obligation to provide the ‘grounds of his  
19 ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic  
20 recitation of the elements of a cause of action will not do. . . . Factual allegations must  
21 be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at  
22 553-56. A motion to dismiss should be granted if the complaint does not proffer "enough  
23 facts to state a claim for relief that is plausible on its face." *Id.* at 570. This standard  
24 applies to all cases. *See, e.g., Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1952 (2009) (finding  
25 under *Twombly* and Rule 8 of the Federal Rules of Civil Procedure, that complainant-  
26 detainee in a *Bivens* action failed to plead sufficient facts “plausibly showing” that top  
27 federal officials “purposely adopted a policy of classifying post-September-11 detainees  
28 as ‘of high interest’ because of their race, religion, or national origin” over more likely

1 and non-discriminatory explanations). From these decisions, the following “two  
2 principles” arise: “First to be entitled to the presumption of truth, allegations in a  
3 complaint or counterclaim may not simply recite the elements of a cause of action but  
4 must contain sufficient allegations of underlying facts to give fair notice and to enable  
5 the opposing party to defend itself effectively. Second, the factual allegations that are  
6 taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to  
7 require the opposing party to be subjected to the expense of discovery and continued  
8 litigation.” *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

9 II. Legal Claims

10 When liberally construed, Plaintiff’s allegations that excessive force was used  
11 against him during a cell extraction, states a cognizable claim for the violation of his  
12 Eighth Amendment rights against Defendants Sergeant W. Struffert and Captain K.  
13 Cruse. The complaint will be ordered served upon these Defendants.

14 Plaintiff alleges that Defendants A. Perpiot, N. Cervantes, and J. Whitlow did not  
15 follow prison procedures for videotaping and reporting the use of force. These  
16 allegations do not state a cognizable claim for relief, even when liberally construed,  
17 because there is no constitutional right to a videotape or report on the use of force, nor is  
18 there any other federal law implicated by the failure these Defendants’ actions. Plaintiff  
19 alleges that Defendant E. Scott asked him to hand over his medication for high blood  
20 pressure, and that when he refused, Defendants Nelson and Martinez ordered him to  
21 “cuff up.” These allegations, even when liberally construed, also do not state a  
22 cognizable claim for relief because such actions do not by themselves violate any federal  
23 constitutional right or other federal law. Consequently, the claims against these  
24 defendants will be dismissed.

25 **CONCLUSION**

26 For the foregoing reasons, the Court orders as follows:

27 1. The claims against Defendants E. Scott, A. Perpiot, D. Nelson, R.E. Martinez,  
28 J. Whitlow, and N. Cervantes are DISMISSED. The claims against Defendants W.

1 Struffert and K. Cruse are, when liberally construed, cognizable.

2 2. The Clerk of the Court shall issue summons and the United States Marshal  
3 shall serve, without prepayment of fees, a copy of the complaint and all attachments  
4 thereto, and a copy of this order upon Defendants: **Sergeant W. Struffert and Captain**  
5 **K. Cruse at Pelican Bay State Prison.**

6 The Clerk shall also mail a courtesy copy of the complaint with all attachments  
7 thereto, and this order to the California Attorney General's Office.

8 The Clerk shall also serve a copy of this order on Plaintiff.

9 3. Defendants shall file an answer to the complaint in accordance with the  
10 Federal Rules of Civil Procedure.

11 4. In order to expedite the resolution of this case:

12 a. No later than **84 days** from the date this order is filed, defendants shall  
13 file a motion for summary judgment or other dispositive motion. If defendants are of the  
14 opinion that this case cannot be resolved by summary judgment, they shall so inform the  
15 court prior to the date the summary judgment motion is due. All papers filed with the  
16 court shall be promptly served on the plaintiff.

17 b. Plaintiff's opposition to the dispositive motion, if any, shall be filed with  
18 the court and served upon defendants no later than **28 days** from the date of service of  
19 the motion. Plaintiff must read the attached page headed "NOTICE -- WARNING,"  
20 which is provided to him pursuant to *Rand v. Rowland*, 154 F.3d 952, 953-954 (9th Cir.  
21 1998) (en banc), and *Klinge v. Eikenberry*, 849 F.2d 409, 411-12 (9th Cir. 1988).

22 If defendants file an unenumerated motion to dismiss claiming that plaintiff failed  
23 to exhaust his available administrative remedies as required by 42 U.S.C. § 1997e(a),  
24 plaintiff should take note of the attached page headed "NOTICE -- WARNING  
25 (EXHAUSTION)," which is provided to him as required by *Wyatt v. Terhune*, 315 F.3d  
26 1108, 1120 n. 4 (9th Cir.), *cert. denied*, *Alameida v. Wyatt*, 124 S.Ct 50 (2003).

27 c. Defendants **shall** file a reply brief no later than **14 days** after the date of  
28 service of the opposition.

1 d. The motion shall be deemed submitted as of the date the reply brief is  
2 due. No hearing will be held on the motion unless the court so orders at a later date.

3 e. Along with their motion, defendants shall proof that they served  
4 plaintiff the applicable warning(s) required by *Woods v. Carey*, No. 09-15548, slip op.  
5 7871 (9th Cir. July 6, 2012) and/or *Stratton v. Buck*, No. 10-35656, slip op. 11477 (9th  
6 Cir. Sept. 19, 2012), at the same time they served him with their motion. Failure to do so  
7 will result in the summary dismissal of their motion without prejudice.


8 5. All communications by the plaintiff with the court must be served on  
9 defendant, or defendant's counsel once counsel has been designated, by mailing a true  
10 copy of the document to defendant or defendant's counsel.

11 6. Discovery may be taken in accordance with the Federal Rules of Civil  
12 Procedure. No further court order under Federal Rule of Civil Procedure 30(a)(2) or  
13 Local Rule 16-1 is required before the parties may conduct discovery.

14 7. It is the plaintiff's responsibility to prosecute this case. Plaintiff must keep the  
15 court informed of any change of address and must comply with the court's orders in a  
16 timely fashion. Failure to do so may result in the dismissal of this action for failure to  
17 prosecute pursuant to Federal Rule of Civil Procedure 41(b).

18 IT IS SO ORDERED.

19 DATED: October 25, 2012

20   
21 JEFFREY S. WHITE  
22 United States District Judge  
23  
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**NOTICE -- WARNING (SUMMARY JUDGMENT)**

If defendants move for summary judgment, they are seeking to have your case dismissed. A motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your case.

Rule 56 tells you what you must do in order to oppose a motion for summary judgment. Generally, summary judgment must be granted when there is no genuine issue of material fact--that is, if there is no real dispute about any fact that would affect the result of your case, the party who asked for summary judgment is entitled to judgment as a matter of law, which will end your case. When a party you are suing makes a motion for summary judgment that is properly supported by declarations (or other sworn testimony), you cannot simply rely on what your complaint says. Instead, you must set out specific facts in declarations, depositions, answers to interrogatories, or authenticated documents, as provided in Rule 56(e), that contradict the facts shown in the defendant's declarations and documents and show that there is a genuine issue of material fact for trial. If you do not submit your own evidence in opposition, summary judgment, if appropriate, may be entered against you. If summary judgment is granted, your case will be dismissed and there will be no trial.

**NOTICE -- WARNING (EXHAUSTION)**

If defendants file a motion to dismiss for failure to exhaust administrative remedies, they are seeking to have your case dismissed. If the motion is granted it will end your case and there will be no trial.

A motion to dismiss for failure to exhaust administrative remedies is similar to a motion for summary judgment in that the court will consider materials beyond the pleadings. You have the right to present any evidence you may have which tends to show that you did exhaust your administrative remedies. Such evidence may be in the form of declarations (statements signed under penalty of perjury) or authenticated documents, that is, documents accompanied by a declaration showing where they came from and why they are authentic, or other sworn papers, such as answers to interrogatories or depositions. In considering a motion to dismiss for failure to exhaust administrative remedies, the court can decide disputed factual matters with regard to the exhaustion question. Because the court can resolve factual disputes, unlike a summary judgment opposition, it is not enough to merely show a genuine issue of material fact in opposition to the motion to dismiss.

UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

WAYNE J ROBERTSON,  
Plaintiff,

Case Number: CV12-04698 JSW

**CERTIFICATE OF SERVICE**

v.

W STRUFFERT et al,  
Defendant.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on October 25, 2012, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Wayne J. Robertson #C-24851  
High Desert State Prison  
P.O. Box 3030  
Susanville, CA 96127

Dated: October 25, 2012



Richard W. Wieking, Clerk  
By: Jennifer Ottolini, Deputy Clerk